FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33, An Unincorporated Association, and CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

OPINIONS OF THE COURTS BELOW

The District Court did not render a decision, nor did it make any findings of fact or conclusions of law. The opinion of the Court below is reported in 161 Fed. (2d) 380, and appears on page 19 of the Record. A copy of such decision by Justice Bennett Champ Clark, with the dissent thereto by Justice Henry White Edgerton, is attached hereto as Appendix "A."

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. Judgment below was entered on April 28, 1947 (R. 29). Petitioners applied for a writ of certiorari on July 24, 1947, and such writ was granted on October 13, 1947.

The Statute Involved

The statute involved herein is the Norris-LaGuardia Act, 47 Stat. 70, 129 U. S. C. 101. The portions relevant to a determination of the issues herein are set forth in Appendix "B."

STATEMENT OF THE CASE

This is an appeal from a decision of the Court of Appeals which dismissed an appeal from two orders of the District Court, the one overruling petitioners' motion to dismiss the complaint herein, and the second granting a temporary injunction pending a trial. Thus, the case was presented to the Court below under the facts alleged in respondent's complaint. In addition, respondent filed supporting affidavits which were considered by the Court below and by the trial court.

The allegations of the complaint (R. 1) show that respondent is the owner and operator of a delicatessen in the District of Columbia, and is also engaged in serving meals to the public, and that petitioners are a local labor organization of bakery drivers and its business representative, Mr. Charles M. Andre. The complaint seeks to enjoin petitioners from engaging in peaceful picketing and boycotting against respondent.

The matters out of which the dispute between the parties

arose are succinctly set forth in paragraphs 3 and 4 of the complaint.[1] They indicate disputes over the following: (1) the time of delivery of bakery products; (2) method or practice of making collections for deliveries and delivery service, including payment of a sum claimed owing a union driver as compensation for delivery of bakery products, such sum to be paid by customer (respondent) rather than bakery; (3) the sale by respondent of a non-union made item.

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[1] Paragraphs 3 and 4 of the complaint read as follows:

"3. The defendant number one is an un-incorporated association, commonly called a 'labor union' composed of many members who are mostly bakery drivers. About 2 months prior to to wit, July 5, 1945, one of said member drivers of said defendant union, started to deliver bakery products for Hinkle's bakery, which plaintiff has dealt with for several years. Due to the repeated deliveries of said bakery products to plaintiff during the busy noon hour, he was on to wit, the day aforesaid, required to bring said products, bread, etc., back at a later hour. Shortly thereafter, the said Hinkle bakery, informed plaintiff that the said driver would make no more deliveries to plaintiff and therefore the bakery could make and furnish plaintiff with no bakery products. Plaintiff did immediately thereupon arrange with another bakery to secure its bakery products, the same which were delivered to the plaintiff.

"4. On to wit, July 26, 1945, one Charles M. Andre, the other defendant herein, came in plaintiff's said place of business, and after stating that he was the agent of defendant union, and that a certain sum, about $150.00 was owing to the driver by plaintiff, and that it had to be paid immediately. The plaintiff informed the said agent that no dealings were had with the driver of Hinkle's bakery, that the account had always been with the bakery, and that payment was at all time made direct to the bakery by check, and never to the driver; that whatever was due Hinkle's bakery would be paid in the regular course and upon adjustment made. Defendant Andre stated he was not concerned in any adjustments or account, that payment would have to be made to the driver in full, and further that unless plaintiff immediately discarded and discontinued carrying for sale a certain non-union made item, of the many hundreds of foods, carried by plaintiff aforesaid, his union would stop and prevent any more bread and bakery products, also all dairy products, also all shipments from outside of the District of Columbia made by Railway Express Co., from being delivered to the plaintiff; that his union was formed and maintained to enforce its demands and were able to do so. Shortly thereafter payment of the balance due by plaintiff to Hinkle's bakery was made direct to said bakery minus certain credits, said payment was thereafter returned by defendant union with a letter signed by defendant Andre as president, setting forth that the payment, 'which is owned to our member, Leon Wolfe, cannot be accepted.'"

As to the first dispute, the complaint charges that it was resolved by respondent arranging for another bakery to deliver its bakery products at the time required by respondent, thus displacing petitioner. As to the second dispute, the complaint alleges that the sum in question was owed by the bakery rather than by respondent, the driver not being in respondent's employ, and that respondent was obligated to pay for such deliveries only to the bakery which would then pay the driver. As to the third dispute, the complaint is silent concerning its alleged disposition, but a supporting affidavit (R. 8) alleges that respondent discontinued the sale of the non-union made item.

The complaint then alleges that on respondent's refusal to accede to petitioners' demands in the three disputes, petitioners peacefully picketed and boycotted respondent's place of business, causing respondent irreparable damage. No violence or threats thereof were alleged. The complaint was not verified and contained none of the allegations required under Section 7 of the Norris-LaGuardia Act.

A motion for an injunction (R. 5) and a motion to dismiss on grounds of insufficiency of the complaint and lack of jurisdiction of the Court under the Norris-LaGuardia Act (R. 5) were jointly submitted to Judge Goldsborough on September 5, 1945. After hearing arguments, the Court, on September 7, 1945, entered orders overruling the motion to dismiss and granting respondent's application for an injunction pending trial (R. 13, 14). The Court did not hear the testimony of any witnesses under oath; neither did the Court make any findings of fact or otherwise comply with the requirements of Sections 7 and 9 of the Norris-LaGuardia Act.

Petitioners then applied to the Court of Appeals for the allowance of a special appeal pursuant to Title 17, Sec. 17-101 of the District of Columbia Code and, in addition, took an appeal as a matter of right under Section 10 of the

Norris-LaGuardia Act. The petition for the allowance of a special appeal was denied by the Court of Appeals, but that Court entertained a general appeal and set the case for argument on the single question of whether the case involved a labor dispute under the terms of the Norris-LaGuardia Act (R. 18). After hearing arguments, a majority of that Court dismissed the appeal from the orders of the District Court, holding in substance that the disputes set forth in the complaint were not labor disputes under the Norris-LaGuardia Act because petitioners' demands did not involve **bona fide** labor controversies and were illegal and improper (R. 18). The majority stated in this respect that the disputes did not embrace "a **bona fide** labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives."

Petitioners then sought a review and reversal of the majority judgment of the court below, and this Honorable Court granted certiorari on October 13, 1947.

SPECIFICATION OF ERRORS

1. The United States Court of Appeals for the District of Columbia erred in holding that the complaint was insufficient and in not dismissing such complaint.

2. The United States Court of Appeals for the District of Columbia erred in holding that the present case did not involve a labor dispute, and that the District Court was without jurisdiction to issue an injunction without the taking of testimony and the making of findings as required under the Norris-LaGuardia Act.

The Question Presented

The sole question involved herein is whether this case involves a labor dispute under the definition of that term in the Norris-LaGuardia Act so as to render the complaint

for injunction insufficient as a matter of law and so as to deprive the District Court of jurisdiction to issue an injunction without the taking of testimony and the making of findings as required under the Norris-LaGuardia Act.

SUMMARY OF ARGUMENT

The complaint herein shows on its face that not only one but three separate labor disputes existed between respondent (an employer) and petitioners (a labor organization and its officers). The trial court disposed of one of the alleged labor disputes by erroneously referring to an affidavit filed by respondent instead of taking testimony and making findings of fact, and disposed of the other two labor disputes by finding them to be without merit and improper. Such a determination flies in the face of the definition of the term "labor dispute", contained in Section 13 of the Norris-LaGuardia Act. That definition makes no distinction between the legality or illegality, the merit or lack of merit, the rightness or wrongness, of any particular labor dispute. In affirming the determination of the trial court under a similar line of reasoning and permitting the trial court to issue a temporary injunction against peaceful picketing without the taking of evidence or the making of findings of fact and law, the United States Court of Appeals for the District of Columbia ignored the provisions of the Norris-LaGuardia Act and decided contrary to the decisions of this Court in **New Negro Alliance v. Sanitary Grocery Co.**, 303 U. S. 552; **Milk Wagon Drivers' Union v. Lake Valley Farm Products**, 311 U. S. 91, and **United States v. Hutcheson**, 312 U. S. 219, all of which hold that it is not the function of courts to pass upon the merit or lack of merit of any labor dispute once such dispute, as defined in the Norris-LaGuardia Act, is shown to exist.

ARGUMENT

I. The Complaint Indicates that the Present Case Involves Three Labor Disputes Under the Norris-LaGuardia Act, and the Courts Below Erred in Not Dismissing the Complaint and in Permitting an Injunction Without the Taking of Testimony.

Since the complaint herein was not verified and contained none of the various allegations required under Section 7 of the Norris-LaGuardia Act, and since the trial court failed to take evidence or make findings of fact and conclusions of law as required under Sections 7 and 9 of the Norris-LaGuardia Act, it is obvious (and not denied) that the majority decision of the court below, sustaining the complaint and holding that the trial court had jurisdiction to issue the injunction against picketing without compliance with the Norris-LaGuardia Act, is erroneous if in fact the present case does involve a labor dispute within the meaning of that term as defined in Section 13 of the Norris-LaGuardia Act. See **Lauf v. Shinner**, 303 U. S. 323; **New Negro Alliance v. Sanitary Grocery Co., supra**; **Green v. Obergfell**, 121 F. (2d) 46, certiorari denied, 314 U. S. 637; **Grace Co. v. Williams**, 96 Fed. (2d) 478.

Even a cursory reading of the complaint shows the existence of not one but three labor disputes between the respondent and petitioners. Each of these disputes has been referred to briefly in the "Statement of The Case" herein, supra, p. 2. To elaborate, the complaint reveals that the respondent and petitioners are persons engaged in the same industry or having direct interests in that industry, i.e., the sale of bakery products, delivery of the product being a close and indispensable concomitant of such sale. Further, the dispute is between an employer and employees and an association of employees; the fact that the proximate relationship of employer and employees may not exist as between the respondent and the delivery driver whose

services he utilizes is immaterial in view of the proviso in Section 13(c) of the Norris-LaGuardia Act. Finally, direct injunctive relief against picketing and boycotting is sought by one person in the industry against another in the same industry. Thus, the definitions contained in subsections (a) and (b) of Section 13 are satisfied.

It remains to be determined whether the disputes over (1) time of delivery, (2) collection practices, and (3) the sale of a non-union item constitute a "controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Act of Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73.

(1) The dispute set forth in the complaint between respondent, who is the recipient of the deliveryman's service, and the deliveryman, who is a member of petitioner union, as to the particular hour in the day during which such member is to deliver bakery products to respondent bears a direct relationship to the conditions of such member's employment. Obviously, every customer in the city could not be supplied at one particular time of the day, and deliveries must be spaced. It is to be noted that the complaint asserts that respondent **"required"** (R. 2) the member to deliver products at an hour later than customary; were oral testimony taken as required by statute, it would have been shown that such demand had a very adverse effect upon the driver's schedule. The fact that the driver was alleged to have been replaced by another driver could not, as determined by the majority decision below, operate to end that dispute, because, if so, a similar replacement of strikers by other workers could end any labor dispute. As pointed out in the dissenting opinion of Judge Edgerton, the driver

was in the same position as a striker for the purposes of the Act and of this case, the Act making it immaterial "whether or not the disputants stand in the proximate relation of employer and employee."

(2). Likewise, the dispute between the respondent and petitioners concerning the method of payment, i.e., whether the driver should be paid for his services directly by respondent or by the bakery, included in which was the particular demand that the driver be paid a particular sum claimed to be owing him for his services, constitutes a dispute over working conditions. It is clearly of major importance to any worker performing services to determine whom he can look to each week for payment of those services. Again, were oral testimony permitted, as contemplated under the Act, it would have been shown that it is the universal practice and custom in the District of Columbia for bakery drivers to be paid directly by the bakery's customer, but that by arrangement between the driver and the plaintiff, remittance was made to Hinkle's bakery for and on behalf of the driver as a convenience to respondent. Testimony would have disclosed the true situation—which is that the driver is responsible for the commodity delivered, and the money to be paid by respondent includes the wages and commissions due the driver for the services performed by him, and that such arrangement is operative in this class of employment in the District and has been so for many years, and that respondent knew of it and agreed thereto, and the check transmitted being marked "Paid in full" was unacceptable and for that reason refused.

Involved in the dispute concerning collection practices is the demand that the driver be paid for services rendered. Certainly, if it is a labor dispute to be asked that wages be increased or that wages not be cut, it is equally a labor dispute to ask that compensation for services rendered be paid; indeed, it is a traditional function of many labor

organizations to assist their members in the collection of sums claimed to be due and owing for work performed.[2]

(3) Finally, the complaint alleges the existence of a dispute concerning the sale by plaintiff of a "certain" non-union made product. Certainly, no more traditional dispute exists than that between labor organizations and persons who assist in the process of impairing or threatening union-established working conditions by dealing with employers manufacturing or delivering products with non-union help and under non-union conditions.[3] See **Apex Hosiery Co. v. Leader**, 310 U. S. 469, wherein the Court said:

> "* * * in order to render a labor combination effective it must eliminate the competition from non-union made goods, * * *."

Indeed, the Norris-LaGuardia Act was specifically enacted

[2] See, for instance, Constitution and By-Laws, International Alliance of Theatrical Stage Employees, Article IX, p. 91:

"Section 1. Claims for Compensation.

"Any member of this Alliance to whom an employer owes a certain sum of money as compensation for services performed by the Board, which certain sum is due and unpaid, shall, if unsuccessful in his individual efforts to obtain payment, proceed to invoke the aid of the Adjustment and Claims Department in the manner hereinafter set forth."

[3] At the time of oral argument the trial Court conceded that this allegation in the complaint did allege a "labor dispute." But plaintiff had filed an affidavit in which it was alleged that plaintiff had discontinued the sale of the non-union product. On the basis of the affidavit, the District Court concluded that the labor dispute in connection with the sale by plaintiff of non-union goods had terminated. This overlooks the fact that the allegations of the complaint must determine whether a labor dispute does or does not exist, and if the complaint does reveal the existence of a labor dispute, then it is *mandatory* upon the Court, under Section 7 of the Norris-LaGuardia Act, to take oral testimony under oath and make findings of fact prior to the issuance of any restraining order or injunction. If oral testimony had revealed the fact that a labor dispute had ceased to exist (a fact which defendants deny), then the Court might properly have disregarded that fact. To do this, however, merely on the basis of affidavits is to countenance the very practice which gave rise to the Norris-LaGuardia Act. Most certainly, the complaint must in the first instance be looked to to determine whether a labor dispute exists, and thus whether the Norris-LaGuardia Act is applicable, and thereafter the Court can take testimony to establish the facts and must afford defendants opportunity for cross-examination which is specifically required by the Act. Any other rule would destroy the safeguards against the issuing of injunctions against workers and their organizations solely on the basis of affidavits.

to cure the effect of such decisions as that of the Supreme Court in **New Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,** 274 U. S. 37, in which case a refusal to work on or in connection with non-union products was held to be an unlawful strike under the Sherman Act. See **Milk Wagon Drivers' Union v. Lake Valley Farm Products, supra,** and **New Negro Alliance v. Sanitary Grocery Co., supra; Donnelly Garment Co. v. Dubinsky,** 154 Fed. (2d) 38.

Respondent contends that the dispute concerning the sale of non-union goods cannot be considered by this court because it has been rendered moot by the passage of the Taft-Hartley Act, Section 8(b) (4) (A) of which makes it an unfair labor practice for a union to require an employer not to handle or sell products of any other producer. A conclusive answer to this question, aside from the question of the constitutionality of any such unconditional prohibition of peaceful picketing (see **Bakery and Pastry Drivers and Helpers Local 802 v. Wohl,** 315 U. S. 769, and **In re. Blaney,** 13 Labor Cases, par. 64,039, decided by the Supreme Court of California October 3, 1947), is that the Taft-Hartley Act makes the remedy of injunction available only to the National Labor Relations Board and not to a private employer, so that even if the Act did apply and the constitutional issues were resolved in favor of the Act, and the particular conduct in the present case constituted a violation of the Act, still the respondent herein could not secure an injunction against such activity.

II. The Court Below Erred in Considering Whether the Labor Disputes Were Meritorious.

In the face of direct allegations indicating existence of not one but three labor disputes, and in the face of a request for an injunction against peaceful picketing by a labor organization, it is inconceivable how the trial court or the court below could determine that the safeguards of the Norris-LaGuardia Act should be disregarded and an injunction issued without the holding of hearings and the

taking of testimony. Even were the complaint ambiguous in respect to the existence of any particular labor dispute, certainly sufficient warning that the possibility of a labor dispute might exist did appear from the bare allegations of the complaint and the relief demanded to require at least that the trial court call the parties before it and hear their testimony so as to determine whether or not the type of situation envisaged by the framers of the Norris-LaGuardia Act did exist. See **Lauf v. Shinner, supra, New Negro Alliance v. Sanitary Grocery Co., supra.** Even worse than the refusal to attempt to ascertain the facts by the taking of testimony was the position taken by the court below that, even though the case might involve labor disputes, nevertheless, since such disputes were lacking in merit or were improper or were not legitimate or bona fide, an injunction could issue without observing the procedural requirements of the Norris-LaGuardia Act. Thus to substitute a court's concept of what constitutes a proper or bona fide labor dispute for the explicit statutory definition of the term as contained in the Act, can only operate, as it has operated in the present case, to bring back those very evils which it was the purpose of the Norris-LaGuardia Act to eliminate.

Among the many abuses attending the issuance of injunctions against labor organizations prior to the passage of the Norris-LaGuardia Act, the following two abuses were outstanding: (1) The practice of granting injunctions **ex parte** and on the basis of pleadings or affidavits without the hearing of witnesses or opportunity for cross-examination. See Frankfurter & Greene, "The Labor Injunction," pp. 24-60; 68-81, and Minority Report of Senator Norris, 71st Congress, Calendar No. 884, Report 1060, Part 2, p. 19. (2) The practice of granting injunctions based on the concept of individual judges as to whether any particular dispute was legitimate, praiseworthy, bona fide or otherwise proper, rather than to leave the determination of such matters to the legislative branch of the government. See Frank-

furter & Greene, "The Labor Injunction," pp. 60-66; Minority Report of Senator Norris, **supra**, pp. 11; 15-16.[4]

It was the express purpose of the Norris-LaGuardia Act to prevent these practices. If the decision of the majority of the court below constitutes good law, that purpose can, with ease, be frustrated and perverted. That the majority decision below does not constitute good law is obvious not only from a study of the purposes and objectives of the Norris-LaGuardia Act and a regard for its literal language, but also from the determination of this Honorable Court in the cases of **New Negro Alliance v. Sanitary Grocery Co., supra; Milk Wagon Drivers' Union v. Lake Valley Farm Products, supra,** and **United States v. Hutcheson, supra.** These decisions made clear that the Norris-LaGuardia Act precluded judicial inquiry into the propriety or merits of any labor dispute once a dispute as defined in the Norris-LaGuardia Act was shown to exist.

In the **New Negro Alliance** case, this Court held that:

> "The Act does not concern itself with the background or the motives of the dispute. . . . The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of

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[4] The report states in this connection as follows:

"It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has undertaken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It cannot be successfully claimed that the courts have not written into these injunction cases a new law of labor disputes, fitting the law to each particular case and then enforcing this new law made by the court . . . It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?"

jurisdiction by federal courts and to obviate the results of the judicial construction of that Act. It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices."

In the **Milk Wagon Drivers' Union** case this Court held that:

"Whether rightly or wrongly, the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. **To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term**; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife. (Emphasis supplied.)

In the **Hutcheson** case this Court held in respect to Section 20 of the Clayton Act (of which the Norris-LaGuardia Act is a narrowing extension, **United States v. United Mine Workers**, decided March 6, 1947) that

". . . So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness

of the end of which the particular union activities are the means."

The Court further held in that same case, in respect to the Norris-LaGuardia Act, as follows:

"... But we need not determine whether the conduct is legal within the restrictions which **Duplex Co. v. Deering** gave to the immunities of Sec. 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt."

In thus ignoring the plain language of the Norris-LaGuardia Act in utter disregard of its essential purpose and objectives, and in disregarding applicable decisions of this Court upon the very point in issue, it is respectfully submitted that the Court of Appeals for the District of Columbia has committed grievous error requiring amendment by this Court. The decision below, if allowed to stand, would operate as strong precedent for return to the era of judicial rather than legislative determination of the merits of labor controversies, an era supposedly closed by the Norris-LaGuardia Act as a matter of national policy.

CONCLUSION

Petitioners, therefore, contend for the reasons above set forth that the judgment of the United States Court of Appeals for the District of Columbia should be reversed, the injunction be withdrawn, and the complaint herein be dismissed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9121

BAKER SALES DRIVERS LOCAL UNION No. 33, an Unincorporated Association, and CHARLES M. ANDRE, *Appellants*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Appellee*

Appeal from the District Court of the United States for the District of Columbia

Decided April 28, 1947

Mr. Herbert S. Thatcher, with whom Mr. Joseph A. Padway and Miss Jacqueline Wemple were on the brief, for appellants.

Mr. William E. Leahy, with whom Mr. Nicholas J. Chase was on the brief, for appellee.

Before Edgerton, and Clark and Wilbur K. Miller, JJ.

CLARK, *J.*:

Technically, this cause is before us on an appeal from an order of the District Court overruling appellants' Motion to Dismiss and an order of the District Court granting an injunction pendente lite against appellants. Appellants' petition for allowance of a special appeal from the same orders, filed subsequent to the filing of the Notice of Appeal of right, was denied by this Court at the October term, 1945. Appellee moved to dismiss the appeal on the ground that neither order is a final order appealable to this Court. Appellants answered this motion to dismiss by alleging that the cause involved a "labor dispute" and was appealable as a matter of statutory right under the Norris-LaGuardia Act. This Court at the April term, 1946, ordered that the case be placed on the summary docket and set for argument on the single question as to whether the case involves a labor dispute under the terms of the Norris-LaGuardia Act. That, therefore, is the only question now to be considered by this Court.

This litigation arises out of these facts. Appellee here, plaintiff below, is the owner and operator of a delicatessen. Appellants, defendants below, are a local union organization of bakery drivers, as well as the Union's business agent. Appellee had been for a number of years the purchaser of a considerable quantity of bakery products from Hinkle's Bakery, delivered by a Union driver, who, it is undisputed, was an employee of Hinkle and not of appellee. For some time prior to July 5th, 1945, the Union driver had been making deliveries to appellee at the noon hour.

This schedule was unsatisfactory to appellee because a luncheon business was operated in conjunction with the delicatessen and at this hour it was inconvenient, if not impossible, for appellee to check the bakery delivery with the driver. Appellee requested delivery at a later hour. Thereafter, Hinkle's Bakery advised appellee that the driver would make no further deliveries to her establishment and that the bakery could make and furnish appellee with no more bakery supplies. Appellee then turned to other sources for supplies and secured another connection on terms mutually agreeable to both parties.

It is undisputed that throughout the relationship between Hinkle and appellee, appellee had been consistently in the habit of paying all accounts directly to Hinkle.

On July 26, 1945, business agent Andre, representing the Union, appeared at appellee's place of business and stated that $150 was due and owing to the bakery driver who had refused further deliveries. Demand for immediate payment was made. Appellee's manager countered with the claim that he did not owe the driver anything since his practice had always been to pay directly to the bakery.

On this visit the Union representative demanded that payment be made to the driver, and also told appellee that he should immediately stop selling a certain non-Union made item that he observed in appellee's establishment. The latter portion of the demand was complied with by appellee and the sale of the non-Union item was discontinued. Appellee's manager was told that if he did not comply with all of these demands the drivers' Union would stop all shipments of bakery, milk and dairy products coming to his store from any source, even by Railway Express from outside of the District of Columbia. Shortly thereafter appellee made payment, by check, to the bakery, conformable to her contractual relationship with the bakery and as had always been her practice. The check was returned by the Union representative with a letter which

stated that it could not be accepted in settlement because "it was $12.22 short of the amount which is owned (sic) to our member, Leon Wolf."

On July 27, 1945, the New Philadelphia bakery which had been delivering bakery products to appellee, notified appellee that no more deliveries could be made inasmuch as appellant Union had threatened to pull out all of its drivers if any products of any sort were sold or delivered to appellee.

Sometime late in July, 1945, the drivers' Union set up a boycott against appellee which was successful in keeping appellee from purchasing bread either from bakers or retail stores in Washington or surrounding territory, even to the extent of a single loaf of broad. In addition to the boycott, aimed at shutting off the necessary food supplies, appellee's business was picketed by defendant Andre personally and by others and it was generally stated by the Union that appellee was involved in a "labor dispute" with the Union.

In addition to the undoubtedly effective boycott as to bakery products, plaintiff's complaint alleged (and it must be taken to be admitted by the defendants' motion to dismiss) that the defendants had also threatened to prohibit in like manner all deliveries and sales of milk and dairy products to be made to plaintiff, which, if not enjoined, would compel plaintiff to discontinue business to her irreparable damage.

On these essential facts appellee brought a complaint in the lower court asking that the Union be restrained pendente lite and permanently from boycotting and interfering with her business, and from publishing false statements. In addition to the injunctive relief requested, damages in the amount of $50,000 were asked, along with an equal amount of punitive damages. After hearing extensive argument and considering affidavits, the trial court overruled appellants' motion to dismiss and granted appellee's petition for an injunction pending trial.

Under this court's order, as noted supra, the single question before us now is: Does the complaint show the existence of a "labor dispute" as the term is defined in the Norris-LaGuardia Act.[1]

If the question is to be answered in the affirmative, it seems clear that the temporary injunction was erroneously granted, for the

[1] 29 U. S. C. 101.

standards prescribed by Section 7 and 9 of the Act as necessary to the issuance of injunctive relief were not met.[2]

In our opinion the facts of the instant case are so different from those in the two leading cases in this court cited and relied upon by appellants, as to take the case clearly outside those decisions.[3] In those cases exacting consideration was given to the underlying principles which support the Norris-LaGuardia Act, and we are not disposed to modify or repudiate the policy fundamentals expressed in those opinions. We are here concerned with the specific problem of determining whether the trial court was correct in its judgment that on the facts before it no "labor dispute" within the terms of the Act, and the decisions under it, was made out.

In the first place appellants appear to urge that the mere fact that the complaint was directed toward a union, by a commercial

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[2] Section 7 reads in pertinent part: "No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Section 9 provides: "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

[3] Green v. Obergfell, 73 App. D. C. 300, 121 F. (2d) 46, cert. denied, 314 U. S. 637; Fur Workers Union, Local No. 72 v. Fur Workers Union No. 21238, 70 App. D. C. 122, 105 F. (2d) 1, aff'd 308 U. S. 522.

concern which admittedly had some contact but no contractual relations with union members, is sufficient to subject the controversy to the interdiction of the Act. This argument, we think, goes substantially beyond the points decided, and the interpretations established in precedent cases. It is an unwarranted advance from the terms of the statute and the judicial interpretations stating that the proximate relationship of employer and employee need not exist in order that there be shown a labor dispute within the meaning of the law. See *Lauf* v. *Shinner*, 303 U. S. 323; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. If we were to accept appellants' argument on this point we would be providing a basis whereby even the most remote and casual association with a union employee, which resulted in disagreement, would be classed a "labor dispute." The protection of labor in its broad programs of organization, and in its specific efforts to advance the individual and collective well being of its membership does not require that we open the way, through interpretative expansion of the concept of "labor dispute," to unbridled attacks upon commercial interests which may by chance or misadventure brush a union or a union member. As appears from the decided cases, the courts have been most liberal in holding that wherever the facts show a bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives, the Norris-LaGuardia Act is an effective bar to injunctive relief . . . even where the employer may in effect be an innocent bystander. It does not follow from this that, where the facts do not support the assertion that there is in *fact* a dispute, the union should have the benefit of the doubt, as against the interest in protecting the rights of private property owners whose business may be jeopardized by labor's antagonism.

The Norris-LaGuardia Act was passed to correct certain great abuses by management in the use of the injunctive process during the earlier struggles of the trades unions to gain economic and social rights for their membership. It was obviously intended by Congress to be a highly remedial Act and as such is to be liberally construed by the courts. And, indeed, it has been construed with the most extreme liberality to such a degree that it might be said with some justice that there have been extensions of the purposes of the Act not by legislative enactment but by judicial legislation. Be that as it may, no court so far as we are advised or have been able to find has ever gone so far in extending and defining the Act as to apply it to a situation where the business agent of a union, having no contractual relations whatever with the proprietor of any business, takes it upon himself to act as the volunteer collection agent for a third party and attempts by threats, picketing and boycott to ruin a legitimate business over a difference of $12.20 between

original parties to a transaction to which the business agent was an intruder and which should have been determined in the Small Claims Branch of the Municipal Court. To maintain that such gratuitous interference on the part of defendant Andre constitutes a "labor dispute" within the careful definitions of the Norris-LaGuardia Act is ridiculous.

As in all cases where two readily acceptable basic policies collide, it is the court's function to weigh and balance the conflicting interests.[4] Here we have the interests of labor under its protective shield of the anti-injunction legislation to measure against the interests and rights of the appellee. Viewing the problem in the light of facts before the trial court, we think the result which was reached is correct.

Turning to the specific items alleged as constituting a labor dispute we find that the first relied upon is a matter of delivery hours. The appellee admittedly objected to taking delivery at the time the particular driver involved desired or, because of route restrictions, had to make delivery. The question here is whether this amounts to a controversy concerning the "hours of employment." Here appellee asked for a more favorable delivery time, but when told that this driver could not or would not make delivery at any other time, the matter was dropped, and appellee turned to another bakery (also served by union drivers) for supplies. From this situation we fail to perceive how a "dispute" may be said to exist. It cannot create a dispute for a tradesman to accede to the demands of the adversary, and to attempt to conduct a business notwithstanding disadvantages may be suffered by the tradesman.

As for the alleged controversy regarding the money due to the driver, it does not anywhere appear that there was any obligation running from appellee to the driver or to the union. The purchases of bakery products were made from the bakery, and payment was sent to the bakery. So far as appellee was concerned any payment to the driver was a matter between the bakery and the driver, as its employee. This arrangement cannot, in our judgment, be tortured into a dispute as to "wages."

To suggest, as appellants do in their brief, that an employee of an independent contractor (The Hinkle Bakery occupied no relationship to appellee save that of seller and buyer) who, for reasons of his own, refused to continue delivery on behalf of his own employer and induced the employer (Hinkle) to discontinue sales is "a striker," and further to suggest that for appellee to attempt to obtain his bakery supplies from other independent

[4] See particularly Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, where Labor's protective legislation was held not to shield the union from the provisions of the Sherman Act.

sellers is to replace a striker with another laborer, is reductio ad absurdum.

Equally untenable is the theory that because defendant Andre is the business agent of a union and chooses to turn himself into a volunteer collection agent for the Hinkle Bakery he thereby creates a labor dispute within the meaning of the Norris-LaGuardia Act.

There is the further item concerning the non-union product found in appellee's establishment by the union agent. As to this it appears from affidavits in the record that upon receiving the demand to discontinue selling this non-union item, it was eliminated from the products offered for sale by appellee. Appellant contends that appellee cannot rely upon the affidavits in question because the Act proscribes their use. We think the appellee's response to the contention represents the correct view. The question for determination was a preliminary one to be decided in terms of the trial court's general equitable jurisdiction. To determine whether that jurisdiction existed in the face of the Norris-LaGuardia Act, the court properly took into account the affidavits before it.

There being, in our opinion, no bona fide "labor dispute," we do not think that in the present situation the terms of the injunction require modification.[5]

Appeal dismissed.

EDGERTON, *J., dissenting:*

It seems to me clear that this is a "case involving or growing out of a labor dispute." The Norris-LaGuardia Act forbids injunctions in such cases unless specified requirements are met. These requirements include (1) a complaint under oath; (2) testimony taken in open court; and (3) "findings of fact by the court, to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .; (b) That substantial and irreparable injury to complainant's property will follow: (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; (d) That complainant has no adequate remedy at law; and (e) That the public officers are charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."[1] In this case the complaint was

[5] 5. *Cf.* the underlying fact situation in Thornhill v. Alabama, 310 U. S. 88.

[1] 47 Stat. 71, § 7, 29 U. S. C. § 107. *Cf.* footnote 2 of the opinion of the court.

not under oath, no testimony was taken in open court, and no facts were found. It is not even contended that the facts required by the Act existed.

The court states that appellee "requested" delivery at a later hour. Appellee's complaint states that the driver was "required" to deliver at a later hour. Appellee would not take delivery at the old hour and the driver would not make delivery at a new hour. Since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee," this dispute concerning the time when the driver's work should be done was as plainly a labor dispute as if it had concerned the introduction of a night shift in a factory. Afterwards a dispute arose over appellee's alleged sale of non-union goods. This also was a familiar type of labor dispute. It is immaterial whether the dispute over the driver's money claim was or was not a labor dispute. One labor dispute brings the Norris-LaGuardia Act into operation. Here there were at least two. Since the boycotting, picketing and other conduct of which appellee complains grew out of these disputes, this is a "case involving or growing out of a labor dispute."

The court takes the somewhat paradoxical position that the disputes regarding working hours and non-union goods were not labor disputes. Its theory is that there is no labor dispute unless the court thinks the interests the defendants seek to promote are "legitimate" and are more important, on balance, than the conflicting interests of the plaintiffs. The court identifies the statutory term "labor dispute" with the court's concept of a "bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives." But the Act says nothing about the legitimacy of objectives or the balancing of conflicting interests. The Supreme Court has overruled this court's theory in these words: "To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term . . ."[2] That definition is: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiation, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." [3] The rights and wrongs of the disputes and of the conduct growing out of them, as to which I

[2] *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 99.

[3] 47 Stat. 73 § 13(c), 29 U. S. C. § 113(c).

express no opinion,[4] have nothing to do with the question whether this is a "case involving or growing out of a labor dispute."

The court's ruling comes to this, that the Act has no application to labor activity which a court thinks illegal or improper. But the Act has no practical application to anything else, for courts have never enjoined labor activity which they thought legal and proper. Therefore the court's ruling not only conflicts with the Act but nullifies it. The Act was passed for the very purpose of preventing courts, except in the extraordinary circumstances specified in the Act, from issuing injunctions against labor activity which they thought illegal or improper. There is no finding and no contention that those extraordinary circumstances were present here.

The court holds also, in effect, that to replace a striker with another worker is to "accede to the demands" of the striker,[5] ends any dispute, and prevents further activity on his behalf from growing out of a dispute.

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[4] Except that the peaceful picketing which the District Court enjoined was within appellants' rights under the Constitution. *Thornhill v. Alabama*, 310 U. S. 88; *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, 315 U. S. 769.

[5] It may be that the driver was not technically a striker, since he did not stop working for his immediate employer Hinkle's Bakery. But he is in the same position as a striker for the purposes of the Act and of this case, since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee."

APPENDIX B

On the question of whether plaintiff failed to make certain necessary allegations, and whether the Court failed to observe various procedural requirements in issuing the temporary injunction, the following sections of the Act are applicable:

"Section 7. No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to co...plainant's property will be unavoidable, such a tem-

porary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. Mar. 23, 1932, c. 90, Sec. 7, 47 Stat. 71."

"Section 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, Sec. 8, 47 Stat. 72."

"Section 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

On the question of whether a labor dispute exists, making the Norris-LaGuardia Act applicable, the following section is relevant:

"Section 13. When used in sections 1-15 of this title and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are

members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73."